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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 433.

WILLIAM E. LAMB, *Petitioner,*

vs.

WILLIAM A. SCHMITT, RECEIVER, *Respondent.*

BRIEF ON BEHALF OF PETITIONER.

EDWARD B. BURLING,
EMILE GODCHAUX,
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I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 9, 1931, and is reported in 48 Fed. (2d) 533. (R. 169-175.) The opinion of the District Court is reported in 43 Fed. (2d) 770. (R. 156-160.)

II.

STATEMENT OF THE CASE.

The writ of certiorari in this case was granted November 2nd, 1931, to bring to this Court for review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered April 9, 1931. The judgment reversed an order of the United States District Court for the Northern District of Mississippi.

The order of the District Court was an order which quashed service made on the petitioner within the Northern District of Mississippi, of a summons issued by that court. The service was quashed because the court found that Lamb was, at the time of such service, an attorney at law resident in the State of Illinois, and was present in the Northern District of Mississippi for the purpose of attending a hearing in an equity case pending in the same court as attorney of record for one of the defendants therein, and as a respondent in a contempt proceeding in the same case, and for no other purpose, and was therefore immune from the service of process. (R. 155-156, 96-99.)

The sole question before this court is therefore whether under the circumstances the petitioner Lamb was exempt from service of process.

The suit in which the summons was issued was begun against the petitioner Lamb by the respondent Schmitt as Receiver. He had been appointed Receiver in a creditor's suit pending in said District Court entitled *Sterling B. Cramer v. Florence T. Holland,* Cause No. 129. The bill in the case now before the Court alleged that Lamb had, while said

Cause 129 was pending and prior to a decree therein, accepted payment of fees from Florence T. Holland. The bill further alleged that by the final decree in said Cause 129 the entire estate of Florence T. Holland was impressed with a trust as of the date of the filing of the bill in said cause for the benefit of said Cramer and other creditors of W. P. Holland who might intervene. The receiver then asserted that Lamb had notice of the rights of the creditors and therefore the payments made to him by Mrs. Holland were subject to the terms of the trust. The bill prayed that Lamb be decreed to return all such payments to the Receiver. (R. 1-5.)

The subpoena in due form was issued on this bill of complaint on April 30, 1930, and was served on petitioner in Clarksdale, Mississippi, on the evening of the same day. (R. 94-95.) At the time of service, petitioner was en route to his home at Evanston, Illinois, after having on that day attended a session of the District Court for the Northern District of Mississippi at Yazoo City, Mississippi. (R. 109-113.)

On May 16, 1930, Lamb, not having previously appeared in any way, appeared specially in the District Court for the sole purpose of moving to quash *service* of the summons on the ground that he was privileged and immune from the service thereof as a non-resident attending a session of court in that jurisdiction. (R. 96-99.) The motion was supported by an affidavit setting forth that the sole occasion for his presence in the district at the time the process was served was to be present, on the day the summons was served, at a hearing in the District Court for the Northern District of Mississippi as an attorney of record for one of the defendants in the case

of *S. B. Cramer v. Florence T. Holland, et al.,* No. 129 in equity, there pending, and also as a respondent in a contempt proceeding brought against him in that case, and that, except for these reasons, he would not have been within the jurisdiction of the District Court for the Northern District of Mississippi at the time the summons was served. (R. 108-113.)

Counter affidavits of Sam C. Cook (R. 140-145) and Joseph F. Ellis (R. 145-147), and the oral testimony of Gerald FitzGerald (R. 148-154), and copies of the original and supplemental bills and the final decree in cause No. 129 (R. 7-64; 64-78; 78-94), and of Lamb's answer to the citation for contempt (R. 116-140), were received in evidence in opposition to the motion. (R. 114-116.)

On October 9, 1930, the District Court granted the petitioner's motion and entered a decree quashing the service of process. (R. 155-156.)

On April 9, 1931, the Court of Appeals reversed the decree quashing the service. In its opinion (R. 169-175), 43 Fed. (2d) 533, the court held that the funds which the bill of complaint charged Lamb with accepting were within the constructive possession of the court in cause No. 129, and that Lamb was not entitled to claim, in a suit against him for the recovery of such funds, the immunity from service of process "usually accorded practitioners when actually engaged in their professional duties before such court." (R. 175.)

III.

SPECIFICATION OF ERRORS.

1: The Circuit Court of Appeals erred in reversing the decree of the District Court.

2. The Circuit Court of Appeals erred in determining the issue of petitioner's immunity from service of civil process solely upon consideration of the nature and merits of the cause of action pleaded against him.

3. The Circuit Court of Appeals erred in not determining the issue of petitioner's immunity from service of civil process upon consideration of the reason for his presence in the district where the process was served.

IV.

SUMMARY OF ARGUMENT.

The general rule was conceded by the Court of Appeals and was not denied by the respondent that a non-resident present in a foreign jurisdiction solely because of attendance in court is immune from service of process. That the petitioner Lamb came within the general rule was also conceded. Therefore the only question is whether the present case presents any peculiarity which should constitute it an exception to the general rule.

The Court of Appeals' opinion does not disclose clearly what exception is intended to be created, and an examination of all possible exceptions fails to disclose anything in its support.

ARGUMENT.

A.

Lamb Was Present in the Jurisdiction as a Party and as an Attorney and was Therefore Exempt from Service of Process and the Order of the District Court Quashing the Service was Correct.

The general rule that a non-resident while attending court in a foreign jurisdiction shall be exempt from service of process was not denied by the Court of Appeals and is not denied by Respondent. And it was found by the District Court and conceded by the Court of Appeals that Lamb at the time he was served was a non-resident present in Mississippi solely as a party and as an attorney for a party in court proceedings then pending.

Whether this exemption from service be called a privilege of the Court or of the party would seem to be irrelevant. It is not in a strict sense a *privilege* at all. Rather we are dealing with a *rule of law* supposed to promote the administration of justice. That courts should be able to conduct their business in a free and unhampered fashion is regarded as important. To that end it has been established as a rule of law that witnesses, parties litigant, and attorneys shall not be deterred from attending Court through fear of molestation by process servers. If process is served on persons who are in the jurisdiction solely on business with the Court such service will be quashed.

Stewart v. Ramsay, 242 U. S. 128.
Page Co. v. Macdonald, 261 U. S. 446.
Central Trust Co. v. Milwaukee St. Ry. Co., 74 Fed. 442.

Read v. Neff, 207 Fed. 890.
Durst v. Tautges, Wilder & McDonald, 44 Fed. (2d) 507.

Lamb admittedly was in Mississippi on Court business and should have been free from molestation by process servers in another suit unless there was some peculiarity attached to his presence there or some peculiarity in the nature of the suit in which the process was issued which makes this case an exception to the general rule. The argument before this Court must therefore concern itself, not with the general rule which is conceded, but with an inquiry whether there are any exceptions to the general rule and whether this case comes within any such exception.

B.

The Case Discloses no Reason for Creating Any Exception to the General Rule that Process Servers Shall not Molest Persons Who Are in the Jurisdiction Solely for Attendance on the Court.

The books and decided cases contain no exception to the rule which would be applicable in this case. The Court of Appeals, although admitting the general rule, refused to apply it. That Court must have considered that there was something about the present case that constituted an exception. But when we read their opinion, the particular exception to the rule they wish to establish is not made clear.

1. Apparently that Court did not mean to hold that there is an exception to the rule of exemption from service wherever the pleadings allege that the

wrong for which suit is brought was done within the jurisdiction of the Court. The precise point was raised in *Page v. Macdonald* (*supra*), and this Court decided that the rule of exemption from process was inflexible and that there was no such exception to the rule.

In that case the facts were that Mrs. Macdonald, a non-resident of Massachusetts, had brought a suit against the Page Company in Massachusetts. While she was in Massachusetts in attendance upon the Court in that suit, she was served with process in a suit by the Page Company for a libel alleged to have been perpetrated by making, in the pleadings in her suit, false statements which were not material to the issues therein. The contention was that by this conduct she had forfeited any claim to immunity from service of process.

In disposing of this contention this Court said:

> "The contention has strength upon first impression, which disappears upon reflection on the purpose of the principle and *the necessity of its inflexibility*. The service of process is upon the individual but the exemption from its requirement is something more than a privilege to him. It is 'the privilege of the court,' we have seen, rather than his. 'It is founded in the necessities of the judicial administration.'" (Italics ours.)

Furthermore the District Court found as a fact:

> "There is no allegation of any misconduct in this state by the defendant and no fact averred to overcome the inference that the alleged fees were receivd by him before he came here." 43 Fed. (2nd) 771.

Therefore we must look further for the exception if there be one.

2. That the suit in which the process was issued is an ancillary suit does not create an exception. It is ancillary only in the sense that it grows out of another suit and jurisdiction depends on the main cause and not on citizenship of the parties to the ancillary bill. But in all other respects it is like any other suit. In this case the bill is an ordinary bill in equity and the regular rules of equity procedure apply to it. Parties must be brought into the proceeding in the same manner as in case of an original bill. In *Pacific Railroad v. Missouri Pac. R. Co.* (C. C.), 3 Fed. 772, it was claimed that since the proceeding was ancillary, the ordinary rules as to service of process could be dispensed with. Mr. Justice Miller repudiated the suggestion in the following language:

> "The argument, by which it is endeavored to support the service of process upon persons without the district, is that the present suit is one that is auxiliary to the former suit in which the decree of foreclosure was had; that it is so far merely a continuation of that suit; and that it is not a new and original suit. * * * It may be conceded for the purposes of this motion that it is to a certain extent auxiliary to the original foreclosure suit, * * * But it also partakes so far of the nature of an original suit that the parties who are here contesting service of this process cannot be brought before the court by anything short of a subpoena in chancery; and cannot be compelled to answer and respond to the allegations of the present bill in any other mode than in the mode usually adopted in original chancery bills."

3. The Court of Appeals *may* have meant to make an exception of this sort, to wit: when a defendant has intermeddled with property constructively in the possession of the Court there can be no exemption from service in a suit to recover that property.

The decided cases recognize no such exception. But if there were such an exception to the general rule of immunity it would not justify the decision of the Court of Appeals, for it cannot be assumed that Lamb has intermeddled with property merely because it is so asserted in the bill. That is the very point which the bill seeks to litigate. The truth or falsity of the claim that Lamb has intermeddled with property in the possession of the Court cannot be determined until after a final judgment in the very cause in which the service is disputed.

If by the general rule a process server must not molest a person who has *not* taken the Court's property, but by an exception to the rule *may* serve a person who *has taken* Court's property—then that exception would not justify service on a defendant when the question of whether he has taken the Court's property is the very question brought into litigation in that very suit. If the propriety of the service on him depends on his character as a meddler with the Court's property, that fact must be judicially established not in that suit but by a prior adjudication.

In *Page v. Macdonald* (*supra*), this Court dealt with an identical contention: Mrs. Macdonald had begun suit in Massachusetts making allegations which Page believed to be libelous, and he accordingly brought suit for libel and had her served while she was in attendance at court. In supporting the service of

process it was argued that Mrs. Macdonald was guilty of a continuing tort within the court's jurisdiction. The court said that Mrs. Macdonald's character as a wrong-doer was not established. They said:

> "Besides, it cannot be assumed as plaintiff in error does, that the pleading in her (Mrs. Macdonald's) suit against plaintiff in error was false and a tort and on that assumption deny her the immunity to which she is entitled. The truth or falsity of the pleadings is not to be *assumed*, it is to be established." (Italics ours)

It is evident then that the opinion of the Court of Appeals cannot be explained as resting upon an exception permitting service of process where the defendant is guilty of intermeddling with property in the possession of the Court.

If the validity of service could possibly be made to depend upon the question whether or not Lamb was a man who had meddled with property in the possession of the Court, then not only was that fact not established affirmatively, the record establishes the negative.

The evidence, introduced by the respondent on the motion to quash the service of summons, shows that the monies received by the petitioner were payments for counsel fees received in the ordinary course of business. The petitioner was first employed in resisting claims for income taxes for a large sum (R. 120-123). Had these taxes been sustained it would have wiped out a great portion of the estate. In addition, the petitioner performed legal services for Mrs. Holland in said Cause No.

129. At the time the payments were made, the only claims of judgment creditors were claims aggregating $132,151.05.* The bill in Cause 129 alleged that Holland had transferred to his wife all of his estate which was alleged to have been worth in excess of $3,000,000. (R. 12, 15, 25, 32.) The bill also asserted that Mrs. Holland was "exceedingly rich and worth more than $2,000,000.00." (R. 32.) She also had a separate estate derived from sources other than transfers from her husband to her. (R. 134.) This separate estate was recognized by the original bill of complaint wherein it was charged that the transfers received from her husband were intermingled with property theretofore owned by her. (R. 26.) It thus appears that at a time when the claims asserted in the creditor's suit amounted to only about 5 per cent of the value placed upon Mrs. Holland's property by the suing creditors, Lamb accepted these counsel fees. There is no suggestion that the fees were excessive in amount for the services rendered. It was not until after all payments to the petitioner had been made, and only two weeks before the final decree in the creditor's suit, that judgments were recovered by the other banks aggre-

*The plaintiff, Cramer, in cause No. 129 was assignee of a judgment for $30,632.78 (R. 9-10, 51-52), which at the time the final decree was entered in the creditors' suit, had been reduced to $19,653.63, inclusive of interest to April 30, 1930 (R. 79). After the commencement of this suit a bank intervened on a judgment rendered in the state court in the amount of $98,681.97, which at the time of the final decree in the creditors' suit amounted to $112,497.42, inclusive of interest (R. 79). The sum of the amounts due on these two judgments was $132,151.05. These were the only judgments sued on until the intervention just preceding the entry of the consent decree, which intervention came after all the payments to Lamb had been made.

gating over $7,000,000. They were brought into that suit by intervention on the day following their recovery, and just thirteen days before the final consent decree in the creditor's suit was entered. (Rec. 79.)

At the time these fees were paid to Lamb no restraining order had been entered and no receiver appointed. The District Court found that there was nothing to overcome the presumption that the monies were received by Lamb outside the jurisdiction of the Court. The receipt of monies in payment of fees would therefore appear to have been entirely correct.

It would seem therefore that service of process cannot be sustained on the claim that Lamb was a meddler with property in the possession of the court, for if there be any such exception to the rule (which is doubted), then not only does respondent fail to show affirmatively that Lamb in fact *was* such a meddler, on the contrary the evidence seems to establish the contrary—that in fact he *was not* such a meddler.

4. Perhaps then the Court of Appeals meant to state an exception as follows: The rule of exemption from service extended to litigants, attorneys and witnesses is subject to this exception to wit, that it shall not apply where a receiver *asserts* in a bill in equity that a defendant has meddled with property constructively in the possession of the Court.

If the exception to the rule of exemption be stated in this form, the exception would not rest upon the *fact* that the defendant was a meddler with property in the possession of the court, but upon the mere *as-*

sertion in the pleadings that the defendant was a man who had so meddled. In order to deprive a defendant of the exemption accorded other defendants it would be enough to allege in the pleadings that he was a man who had meddled with property in the possession of the court. Allegations that a defendant meddled with the property of any ordinary citizen would not deprive him of the exemption, but an allegation that he had meddled with property in the Court's possession would create an exception and deprive him of his exemption. If the Court refused to quash the summons on this ground and later the allegation that the defendant had interfered with property constructively in the possession of the court were proved to be untrue, nevertheless jurisdiction would be maintained. Jurisdiction would depend on a mere *averment,* not on its truth.

There would seem to be no particular reason for such an exception to the rule. The advisability of the whole rule of immunity might be questioned but if immunity applies where the allegation is that a defendant has meddled with the property of an ordinary citizen, why should an exception be created in a case where the allegation is made by a Receiver? One fails to see any difference in the two cases which would warrant any difference in the rule. The reason for the general rule is that operations of the courts would be hampered if parties were deterred from attending by fear of process-servers. That reason is just as applicable where process is at the instance of a receiver as plaintiff as where it is at the instance of any other plaintiff. A party proposing to attend court in a foreign jurisdiction would be deterred just as much by service in a suit by a Receiver as in any other suit.

Finally it should be said that even if there were such an exception to the rule of immunity, this case does not come within it for the bill does not allege any intermeddling by Lamb with property in the constructive possession of the Court. The foundation for the bill is the decree in Cause No. 129. If there were no such decree then there would be no basis for the claim that there was any property in the possession of the Court to be meddled with. And yet as against Lamb that is precisely the situation.

The bill recites that by the decree in Cause No. 129 the entire estate of Florence T. Holland was declared to be a trust fund (Rec. 2) and that by the decree the allegations of the creditor's bill "have been solemnly adjudicated so to be true." This is the basis for the assertion that there was trust property constructively in the possession of the Court with which Lamb intermeddled. And yet as against Lamb the record discloses that there is no such decree. There was no *adjudication.* There was a compromise agreement which the Court permitted to be entered of record. The decree itself recites that it is entered by consent (R. 93), and the affidavit of one of the attorneys for the plaintiff in the cause, filed in opposition to the motion to quash, shows that the decree was the result of negotiations, and was not an adjudication and that Lamb took no part in these negotiations and declined to endorse his approval of the agreement when it was completed (R. 142-144). A decree of this character is not a judgment of the Court but merely an expression of the will of the parties who agree to it. *Hodgson v. Vroom,* 266 Fed. 267. Obviously it is no more binding upon Lamb than any other contract to which he is not a party.

The so-called decree in cause No. 129 also provided "William E. Lamb or Butler, Lamb, Foster and Pope, not to be prejudiced hereby." (R. 93-94) Even if it could be contended that a consent decree to which petitioner had not agreed, in a suit to which he was not a party, could be made the basis of a claim against him, the contention could not survive in the face of this provision. It constituted an express recognition that the trust impressed on the estate of Florence T. Holland which was established by the decree as between the parties consenting to it, was not established as against petitioner. It is therefore evident that the bill contains no sufficient allegations against Lamb that there was any trust fund established with which he could have intermeddled.

Therefore if there be an exception to the rule of immunity that it shall not apply in a case where the bill *alleges* intermeddling with property in the possession of the court the case before the Court does not come within the exception because the allegations are not sufficient to show that any trust has been established as against Lamb.

Probably the underlying reason for the decision of the Court of Appeals was that it would be more convenient to dispose in the District Court of Mississippi of all questions relating to this estate. It was perhaps felt to be inconvenient to apply the established rule of exemption from service of process. No doubt that is true, but every rule of law is inconvenient to someone. It is inconvenient for any ordinary plaintiff in a Mississippi court to have his service on a defendant quashed and to be unable to go on with the litigation; but he must submit to that inconvenience.

It is not perceived in what respect this case differs from any other case.

It is not true, as the Court of Appeals seemed to think, that the case involves the jurisdiction of the Court over the property. No rule of substantive law is before this Court. The only question is one of immunity from service of process. The decision of the Court in this case either way will not affect the Court's jurisdiction over the property or the title to the property. If the service is quashed the Receiver may have to proceed in a different way to make effective that jurisdiction. He may have to get service on Lamb at some other time or may have to sue Lamb in some other jurisdiction; but those facts do not affect the Court's jurisdiction over the property. The Court's jurisdiction over the property is no more affected than if some of the property were in the hands of other parties outside the state of Mississippi who declined to come within it.

It is submitted that the rule exempting from process persons in attendance at court is a wise one and that the facts of the present case present no reason for creating an exception; and that, accordingly the judgment of the Court of Appeals should be reversed.

Respectfully submiltted,

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